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No. 00-1077

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JANET RENO, as Attorney General of the United States; UNITED STATES DEPARTMENT OF JUSTICE; MADELEINE ALBRIGHT, as United States Secretary of State; and UNITED STATES DEPARTMENT OF STATE,

Cross-Petitioners,

—v.—

HUMANITARIAN LAW PROJECT; RALPH FERTIG; ILANKAI THAMIL SANGAM; TAMILS OF NORTHERN CALIFORNIA; TAMIL WELFARE AND HUMAN RIGHTS COMMITTEE; FEDERATION OF TAMIL SANGAMS OF NORTH AMERICA; WORLD TAMIL COORDINATING COMMITTEE; and NAGALINGAM JEYALINGAM,

Cross-Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Antiterrorism and Effective Death Penalty Act of 1996 is void for vagueness under the First and Fifth Amendments to the United States Constitution insofar as it criminalizes the provision of "personnel" and "training" to the lawful, nonviolent activities of selectively designated foreign organizations.

PARTIES TO THE PROCEEDINGS

The following parties were plaintiffs in the district court and cross-appellees in the court of appeals, and are conditional cross-respondents in this Court: Humanitarian Law Project; Ralph Fertig; Ilankai Thamil Sangam; Tamils of Northern California; Tamil Welfare and Human Rights Committee; Federation of Tamil Sangams of North America; World Tamil Coordinating Committee; and Nagalingam Jeyalingam.

The following parties were defendants in the district court and cross-appellants in the court of appeals, and are conditional cross-petitioners in this Court: the Attorney General of the United States, who was Janet Reno at the time this petition was filed; the United States Department of Justice; the United States Secretary of State, who was Madeleine Albright at the time this petition was filed; and the United States Department of State.

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BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-16a) is reported at 205 F.3d 1130. The opinion of the district court (App. 17a- 84a) is reported at 9 F. Supp.2d 1176.[1] The district court's findings of fact and conclusions of law (App. 85a-110a) are reported at 9 F. Supp.2d 1205.

JURISDICTION

The court of appeals entered its judgment on March 3, 2000. A petition for rehearing was denied on September 1, 2000. App. 111a-112a. A petition for a writ of certiorari in *Humanitarian Law Project v. Reno*, No. 00-910, was placed on this Court's docket on December 4, 2000. This conditional cross-petition in *Reno v. Humanitarian Law Project*, No. 00-1077, was placed on this Court's docket on January 4, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Fifth Amendments to the United States Constitution, as well as relevant provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, in particular 18 U.S.C. §2339B and 8 U.S.C. §1189, are reprinted at App. 113a-126a.

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[1] References herein to "App." are to the appendix to the petition for a writ of certiorari in *Humanitarian Law Project v. Reno*, No. 00-910. References to "Cross-Pet." are to the Cross-Petition for a Writ of Certiorari.

STATEMENT

Cross-Respondents rely on the Statement in their Petition for a Writ of Certiorari in *Humanitarian Law Project v. Reno*, No. 00-910, and supplement it with the following statement of the facts and proceedings below that specifically relate to the conditional cross-petition.

Under AEDPA, the provision of "material support or resources" to any foreign organization that has been designated by the Secretary of State as terrorist is a crime punishable by up to 10 years of imprisonment. 8 U.S.C. §2339B(a)(1); App. 115a. AEPDA broadly defines "material support or resources" to include, without limitation, all "personnel" and "training."[2] 8 U.S.C. §2339A(b); App. 118a.

On June 8, 1998, the district court held that the plaintiffs had demonstrated a likelihood of success on their claim that AEDPA's prohibitions against the provision of "personnel" and "training" to designated organizations are unconstitutionally vague. App. 79a-83a. The district court concluded that these terms are "not 'sufficiently clear so as to allow persons of "ordinary intelligence a reasonable opportunity to know what is prohibited."'" App. 79a (citations omitted). In addition, the district court concluded that the terms "appear to prohibit activity protected by the First

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[2] The full definition of "material support or resources" in AEDPA encompasses "currency or other financial securities, financial services, lodging, *training*, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, *personnel*, transportation, and other physical assets, except medicine or religious materials." 8 U.S.C. §2339A(b); App. 118a (emphasis added).

Amendment – distributing literature and information and training others to engage in advocacy."[3] App. 82a.

The district court rejected the government's proposal that the term "personnel" be narrowly construed to include only individuals working at the direction or control of a designated organization, concluding that such a construction is unsupported by any language in AEDPA. App. 80a. On the same grounds, the district court rejected the government's proposal that the term "training" be narrowly construed to include only training on such subjects as "how to use weapons, build bombs, or raise funds." App. 81a.

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[3] As the district court noted, three of the plaintiffs had engaged in activities protected by the First Amendment prior to the enactment of AEDPA, and these plaintiffs were seeking a preliminary injunction barring the government from prosecuting them for continuing to engage in these activities. The Humanitarian Law Project (HLP) and Ralph Fertig, HLP's President, had "advocated for the [Kurdistan Workers Party (PKK)] before the U[nited] N[ations] Commission on Human Rights, petitioned members of Congress, and advocated for the freedom of four Turkish political prisoners convicted of being PKK members or supporters." App. 80a. The district court explained that "HLP and Judge Fertig would like to but are afraid[, as a result of AEDPA's criminalization of the provision of 'personnel' and 'training' to designated organizations,] to write and distribute publications supportive of the PKK and work with PKK members at peace conferences and other meetings toward the cause of peace and justice for the Kurds." App.80a-81a. Additionally, the World Tamil Coordinating Committee was engaged in "distribut[ing] literature and informational materials [of the Liberation Tigers of Tamil Eelam (LTTE)] throughout the United States to advocate on behalf of the Sri Lankan Tamils' human rights." App.81a.

The remaining plaintiffs seek to support the entirely lawful and peaceful humanitarian efforts of either the PKK or LTTE. App. 20a. None of the plaintiffs seeks to support any terrorist activities or any unlawful conduct. App. 20a-31a.

The district court also rejected the government's argument that the vagueness of the terms "personnel" and "training" is mitigated by AEDPA's requirement that the "personnel" and "training" be "knowingly" provided. The district court observed that AEDPA's scienter requirement extends only to the knowing provision of "personnel" and "training," and fails to cure the lack of clarity as to what constitutes "personnel" and "training." App. 82a.

The district court found that plaintiffs had established irreparable injury because AEDPA's prohibitions against the provision of "personnel" and "training" to designated organizations infringed upon their First Amendment rights. App. 83a at n.30. Having concluded that plaintiffs had demonstrated a probability of success on the merits and irreparable injury, the district court proceeded to issue a preliminary injunction barring the government from enforcing these prohibitions against plaintiffs and the members of the organizational plaintiffs.[4] App. 83a at n. 31.

On March 3, 2000, the court of appeals unanimously affirmed the preliminary injunction issued by the district court. App. 13a-16a. The court of appeals agreed with the district court's legal analysis and "conclude[d] that the district court did not abuse its discretion in issuing its limited preliminary injunction." App. 15a.

The court of appeals concluded that the term "personnel":

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[4] The district court denied plaintiffs' request that the preliminary injunction be nationwide in scope, commensurate with the Attorney General's nationwide authority over the enforcement of AEDPA. Instead, the district court narrowly crafted a preliminary injunction that extended no further than plaintiffs and their members. App. 83a at n. 31.

> blurs the line between protected expression and unprotected conduct. Someone who advocates the cause of the PKK could be seen as supplying them with personnel; it even fits under the government's rubric of freeing up resources, since having an independent advocate frees up members to engage in terrorist activities instead of advocacy. But advocacy is pure speech protected by the First Amendment.

App. 14a (citation omitted). Like the district court, the court of appeals rejected the government's request that it read into the term "personnel" a "requirement that the activity prohibited be performed 'under the direction and control' of a foreign terrorist organization." *Id.* The court of appeals explained that "we are not authorized to rewrite the law so it will pass constitutional muster." App. 14a-15a.

The court of appeals raised similar concerns with respect to the term "training":

> Again, it is easy to imagine protected expression that falls within the bounds of this term. For example, a plaintiff who wishes to instruct members of a designated group on how to petition the United Nations to give aid to their group could plausibly decide that such protected expression falls within the scope of the term "training." The government insists that the term is best understood to forbid the imparting of skills to foreign terrorist organizations through training. Yet presumably, this definition would encompass teaching international law to members of designated organizations.

App. 15a.

Finally, the court of appeals, like the district court, rejected the government's argument that any vagueness problems are cured by AEDPA's scienter requirement. App. 15a at n.5. As the court of appeals explained, "the term 'knowingly' modifies the verb 'provides,' meaning that the only scienter requirement ... is that the accused violator have knowledge of the fact that he has provided something, not knowledge of the fact that what is provided in fact constitutes material support." App. 15a-16a.

REASONS FOR DENYING THE WRIT

The conditional cross-petition should be denied. The government has failed to identify a single decision from any court, much less this Court or a court of appeals, that is in conflict with the portions of the decisions below that form the basis of the government's conditional cross-petition. Both the court of appeals and the district court correctly applied clearly established and uncontroverted principles of constitutional law. Their conclusions that AEDPA's prohibitions on the provision of "personnel" and "training" are unconstitutionally vague, and that the government should be preliminarily enjoined from prosecuting plaintiffs and the members of the plaintiff organizations for violating these provisions, are firmly grounded and raise neither new nor significant questions of law.[5]

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[5] The government's argument that the court of appeals erred in applying an abuse of discretion standard in reviewing the grant of the preliminary injunction, Cross-Pet.6, is without basis. "[T]he grant or denial of a preliminary injunction remains a matter for the trial court's discretion, which is exercised in conformity with historic federal equity practice." 11A Wright & Miller, Federal Practice and Procedure §2947 (citations omitted). It is for this reason that, "in reviewing such interlocutory relief, [the

This Court has repeatedly held that criminal statutes which threaten to chill speech and associational rights are void for vagueness when they lack clarity and precision. *See, e.g., Reno v. American Civil Liberties Union*, 521 U.S. 844, 871-72 (1997); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The courts below recognized that AEDPA's prohibitions on the provision of "personnel" and "training" to designated organizations have the apparent effect of criminalizing virtually all human activity on behalf of such organizations, including a substantial amount of core political speech and advocacy entitled to First Amendment protection. App. 13a-15a, 81a-82a. In light of these First Amendment concerns, the courts found AEDPA's criminal prohibitions to be unconstitutionally vague because they are not "'sufficiently clear so as to allow persons of "ordinary intelligence a reasonable opportunity to know what is prohibited."'" *see* App. 13a-14a, 79a (citations omitted).

The vagueness of the challenged provision is illustrated by the predicament in which several of the plaintiffs found themselves after AEDPA's enactment. Fearing criminal investigation and prosecution, HLP and Fertig refrained from engaging in pure First Amendment activities in which they had freely engaged prior to AEDPA. These activities included political advocacy on behalf of the PKK before such bodies as the United Nations Commission on Human Rights and the United States Congress, writing and distributing publications supportive of the PKK, and supporting the PKK at peace conferences and other meetings

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reviewing court] may only consider whether the issuance of the injunction constituted an abuse of discretion." *Brown v. Chote*, 411 U.S. 452, 457 (1973). However, the court of appeals clearly recognized, by its citation to *Does 1-5 v. Chandler*, 83 F.3d 1150 (9th Cir. 1996), that "issues of law underlying the decision [to grant a preliminary injunction] are reviewed de novo." *Does 1-5*, 83 F.3d at 1152 (citations omitted); App. 15a.

towards the cause of peace and justice for the Kurds. App. 20a-25a. All of these activities could potentially be construed as providing "personnel" to the PKK, and could therefore subject plaintiffs to up to 10 years in prison. Indeed, any volunteer effort for a designated group could constitute the provision of "personnel" – including pure advocacy – and any assistance or educational activities could be treated as "training."

The government contends that the vagueness of the term "personnel" can be cured by limiting it to "employees or others working at the direction or control of a specific entity." Cross-Pet. 7. But, as the courts below unanimously concluded, this construction lacks any support in the language of AEPDA. As the Ninth Circuit explained, citing, *inter alia*, this Court's decision in *Swain v. Pressley*, 430 U.S. 372, 378-79 n.11 (1977), "[w]hile [the courts] construe a statute in such a way as to avoid constitutional questions, ... [the courts] are not authorized to rewrite the law so it will pass constitutional muster." App. 14a (citations omitted).[6]

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[6] Notably, the government's interpretion of the term "personnel" as work performed "under the direction or control of a specific entity" would not save the statute. Activities such as writing, speaking, and distributing literature are still protected under the First Amendment even when done under the direction or control of a foreign organization.

The government misreads *Palestine Info. Office v. Schultz*, 853 F.2d 932 (D.C. Cir. 1988), as standing for the proposition that speech conducted under the direction or control of a foreign terrorist organization receives no, or limited, First Amendment protection. Cross-Pet. 8. That case addressed only the government's power to close a mission, and did not involve any attempt to prohibit individuals from speaking on behalf of the Palestinian Liberation Organization in the absence of a mission. The court went to great pains to explain that the PIO and its staff:

> are as free today as they were before [the issuance of a

In addition, the government's proposed narrowing construction is at odds with the purported rationale for AEPDA's prohibitions on the provision of material support to designated organizations, namely that all support must be prohibited because any support may free up a designated organization's resources for terrorist activities. Cross-Pet. 4 and 10. As the Ninth Circuit explained:

> Someone who advocates the cause of the PKK could be seen as supplying them with personnel; it even fits within the government's rubric of freeing up resources, since having an independent advocate frees up members to engage in terrorist activities instead of advocacy. But advocacy is pure speech protected by the First Amendment.

App. 14a.

The government does not even proffer a limiting construction of "training." Instead, it maintains that because some forms of "training" -- such as "training of foreign terrorists on how to use weapons, build bombs, evade surveillance, or launder funds" (*see* Cross-Pet. 10) -- could be

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> State Department order pursuant to the Foreign Missions Act barring the PIO from operating as a foreign mission in the United States] to express whatever ideas they wish and to associate with whichever individuals they wish. They are not free, however, to set up an office that functions as a foreign mission for the Palestinian Liberation Organization when the State Department finds that the national interest requires otherwise.

853 F.2d at 934.

constitutionally proscribed, AEPDA's unlimited prohibition on all "training" is not vague. This is a non sequitur. The fact that a more clearly defined subset of activity may be constitutionally prohibited does not excuse the drafting of a vague and overbroad statute. On the contrary, the very fact that the government can identify in a more clearly defined way what should be prohibited simply illustrates that the vagueness inherent in "training" could easily be avoided. The fact that training in bomb-building is not protected does not justify the criminalization of training in human rights advocacy, peacemaking, kindergarten teaching, health services, or daycare provision. The term "training" is impermissibly vague in all its applications, because one simply cannot know what types of "training" are permitted and what types are proscribed.

Finally, AEDPA's prohibitions on the provision of "personnel" and "training" are unconstitutionally overbroad because they sweep within their ambit a substantial amount of political speech, advocacy, and association. *See Houston v. Hill*, 482 U.S. 451 (1987); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). These terms criminalize virtually the entire range of associational human activity, much of which is indisputably protected by the First Amendment. Accordingly, the decision below is independently sustainable on the ground that the invalidated terms are not only vague, but substantially overbroad.

CONCLUSION

For all of the above reasons, the conditional cross-petition for a writ of certiorari should be denied.

Dated: New York, New York
February 1, 2001

Respectfully submitted,

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